Supreme Court, U.S.
FILED
APR 29 1998
OFFICE OF THE CLERK

No. 97-1732

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and FLORIDA STATE BOARD OF ADMINISTRATION,
Petitioners,

v.

PAUL FELZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a nonparty shareholder who appears, in response to notice provided under Federal Rule of Civil Procedure 23.1, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though the shareholder has not been formally made a party to the action.

2. Whether a court of appeals may apply only prospectively a decision reversing settled precedents concerning its jurisdiction, where retroactive application would permanently foreclose appeal by a party who had reasonably relied on the prior precedents.

PARTIES TO THE PROCEEDINGS BELOW

The following persons or entities were parties to the proceedings in the court of appeals:

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Florida State Board of Administration
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PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

California Public Employees' Retirement System and Florida State Board of Administration are governmental pension funds that have no parent companies or subsidiaries that have issued shares to the public.

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PAUL FELZEN, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

California Public Employees' Retirement System ("CalPERS") and Florida State Board of Administration ("SBA") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 134 F.3d 873. The trial court's judgment and order approving the derivative suit settlement (Pet. App. 11a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

The judgment of the court of appeals involves Federal Rule of Civil Procedure 23.1 and Federal Rule of Appellate Procedure 3. These provisions are set forth at Pet. App. 18a-21a.

STATEMENT OF THE CASE

This case presents two distinct circuit splits, both of which were expressly acknowledged by the Seventh Circuit. As Judge Easterbrook wrote for the panel, "[c]ourts have disagreed for several decades" over whether nonparty shareholders must formally intervene in order to appeal a derivative suit settlement. Pet. App. 2a. Reversing prior Seventh Circuit decisions on point, and disagreeing with the Third and Tenth Circuits, the panel held that formal intervention is an indispensable prerequisite to appeal. The panel also noted courts are in open "disagree[ment]" over whether decisions overruling jurisdictional precedents must always be applied retroactively. *Id.* at 10a. Again departing from prior Seventh Circuit law and contradicting the holdings of other circuits, the panel held that such decisions must be applied retroactively.

The Seventh Circuit's prohibition of appeals by nonparty shareholders eliminates a critical safeguard against collusive derivative suit settlements that benefit only plaintiffs' attorneys and defendant.[1] The court's view that it

[1] *See* 7C Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 1839, at 175 (2d ed. 1986) (nonparty shareholder participation "is intended to discourage the private settlement of a derivative claim under which a shareholder-plaintiff and his attorney personally profit to the exclusion of the corporation and the other shareholders"); *Papilsky v. Berndt*, 466 F.2d 251, 258 (2d Cir.) (Nonparty shareholder participation "is essential in these situations to ensure that the [resolution] of the derivative suit is in the best interests of the corporation and the absent stockholders. More specifically, notice and court approval of settlements under Rule 23.1 discourage private settlements under which the plaintiff-stockholder and his attorney profit to the exclusion of the corporation and nonparty stockholders.") (citations omitted), *cert. denied*, 409 U.S. 1077 (1972); *see* additional authorities cited at note 14, *infra*.

was required to apply its decision retroactively ignored the important policies that encourage litigants to rely on settled law. Here, petitioners conformed their conduct to settled Seventh Circuit precedents only to have their appeal dismissed because the panel decided thereafter to change the law.[2]

These two holdings are also wrong as a matter of law. The Seventh Circuit reasoned that *Marino v. Ortiz*, 484 U.S. 301 (1988) (*per curiam*), requires nonparty shareholder intervention. But this Court in *Marino* suggested only that complete strangers to a class action should intervene before being permitted to appeal; it nowhere indicated that persons who are already privies to the proceedings—such as class members under Rule 23 or shareholders under Rule 23.1—need do so. In fact, nonparty privies *are* routinely permitted to appeal adverse decisions affecting their interests.

The court of appeals suggested that *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981), and *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988), require retroactive application of its decision to limit its appellate jurisdiction because "a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." Pet. App. 9a (citation omitted). But those decisions involve statutory limits on judicial authority. The Court did not decide that purely discretionary, self-imposed restrictions on jurisdiction, such as the one imposed by the panel below, must be applied retroactively. Indeed, courts creating new and purely prudential rules narrowing their jurisdiction can and should apply such rules in a manner that is equitable.

[2] *See, e.g., George v. Camacho*, 119 F.3d 1393, 1397 (9th Cir. 1997) (*en banc*) ("The consequence of such a holding would be that litigants who complied with our rules . . . would lose their rights to appeal, . . . a result that would appear to be unconscionable to most reasoning persons whether learned in the law or not.").

A. Background and Prior Proceedings

At midnight on June 27, 1995, more than a hundred Federal Bureau of Investigation ("FBI") agents raided ADM corporate headquarters and the homes of ADM top executives. The next day, ADM issued a press release announcing that three separate federal grand juries were investigating whether the company's officers had conspired with rivals to fix artificially high prices for citric acid, high fructose corn syrup, and lysine. The evidence the government amassed proved overwhelming: the FBI had obtained audio tapes, video tapes, and documents establishing that ADM executives had conspired with at least three foreign companies to set prices and production quotas. On October 15, 1996, ADM pleaded guilty to criminal antitrust charges and paid a $100 million criminal fine, the largest criminal antitrust fine ever imposed and the subject of national media attention. Settling three civil antitrust lawsuits filed by ADM competitors cost the company another $90 million.

Petitioners CalPERS and SBA are two of the largest public pension funds in the United States. They have combined assets of nearly $200 billion and are among the largest shareholders of ADM stock. SBA owns over 1.7 million ADM shares; CalPERS owns over 2.9 million shares.

In response to the demands of institutional shareholders like CalPERS and SBA and waves of negative publicity, ADM commissioned a report to propose new, more stringent corporate governance measures. Much of ADM's troubles, in the view of shareholders and the public, lay in the personal, professional, familial, and financial connections between the members of the company's board charged with management oversight. Indeed, in October 1995, CalPERS awarded ADM a grade of "F" for its lack of corporate governance principles.

The report ADM eventually issued and adopted in January 1996, however, did little to alleviate shareholder

concern. For instance, while it required (for the first time) that ADM's board include at least a majority of independent members, even persons having obvious and substantial financial ties to ADM could qualify under the new rules as "independent." To remedy that defect and avoid a return to the corporate cronyism that resulted in ADM's criminal plea, CalPERS and SBA submitted a shareholder proposal that no one with personal or financial ties to the company could serve as an "independent" director. They modeled their proposal on accepted standards for corporate independence developed by the Council of Institutional Investors (the "Council").[3] The Council is an association of more than one hundred corporate, public, and union pension funds devoted to addressing their members' investment concerns and promoting responsible corporate governance rules and procedures. Although vehemently opposed by management, the shareholders' proposal still won 41.6 percent of the vote at the 1996 shareholder meeting.

Unsurprisingly, in the wake of the federal criminal probe and continuing publicity, plaintiffs' lawyers dashed to the courthouse to file shareholder derivative actions against ADM directors.[4] Various actions were filed in two states, and all were eventually consolidated in the Central District of Illinois. The consolidated suit alleged that ADM directors had breached their fiduciary duties to stockholders by failing to supervise company employees properly, and sought recovery of the $190 million the company had

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[3] The Council's independence standards have been adopted by most or many of the nation's largest companies. The Council is a deliberative organization that adopts policies only based on essentially unanimous votes among its institutional shareholder members.

[4] "[A]vailable empirical evidence suggests that [derivative] actions regularly follow in the wake of prior proceedings by the SEC or other governmental agencies." John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 673 n.9 (1986).

been forced to pay in criminal fines and civil settlements. Indeed, plaintiffs' attorneys touted in writing to the Council that "a primary goal of our litigation is to recover for ADM as much of the wasted $190 million as is realistically and reasonably possible." Objections of CalPERS and SBA to Proposed Settlement of Derivative Action (July 2, 1997), Exh. A at 2 (attaching letter).

Plaintiffs' counsel, however, did almost nothing to prosecute the case. Nearly two years after filing, they still had not fully litigated defendants' motion to dismiss. By their own admission, they had also neglected to seek any meaningful discovery. In fact, plaintiffs' lawyers focused what little energy they expended on settlement with the insurance company for ADM's executives. In the resulting agreement ("Settlement"), reached on May 29, 1997, plaintiffs' attorneys agreed to release "any and all causes of action" against ADM and the director defendants in return for a mere $8 million settlement fund—less than 4.3 percent of the sought-after $190 million.

The parties then went on to allocate the fund *exclusively* to pay attorneys' fees. Half was earmarked for paying the attorneys bringing suit.[5] The other half was designated for payment of future legal fees incurred by ADM in attempting to reform itself.[6] Not one dime was returned to the corporation for shareholders who lost $190 million in value as a result of their fiduciaries' misconduct.

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[5] The parties signed a so-called "free sailing provision" under which defendants agreed not to oppose a fee petition seeking to direct $3.92 million, or 49 percent of the fund, to plaintiffs' counsel (plus interest, coming out of the remaining 51 percent). The average fee award in shareholder derivative suits where no monetary settlement is made (effectively the case here) is $287,000. Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. Econ. & Org. 55, 63 (1991). Even in cases where monetary settlements are made to shareholders, fee awards average no more than 24 percent of the settlement amount. *Id.*

[6] Adding to the conflict of interest, plaintiffs' attorneys remained eligible under the settlement to earn these fees as well.

The Settlement also endorsed the "reform" measures voluntarily adopted by ADM a year earlier. Though plaintiffs crowed that they had "extracted" concessions beyond ADM's self-imposed reforms, fine-print details revealed the opposite; for instance, plaintiffs did almost nothing to address the question of director independence, the single most important reform measure and the one that had nearly passed at the previous shareholder meeting over management opposition.

After executing the Settlement, and without notice to shareholders, the parties appeared before the district court and obtained an order on May 30, 1997, tentatively approving their agreement. Pursuant to the last sentence in Rule 23.1, the district court at that point invited "[a]ny shareholder of record of ADM" to "appear and show cause, if he, she or it has any [reason] why the proposed settlement of the derivative claims . . . should or should not be entered thereon." Order Preliminarily Approving Settlement and Providing for Notice at 3 (May 30, 1997).[7] The court set a deadline of July 3, 1997, for written objections and scheduled a final settlement hearing for July 7, 1997.

In response to the court's invitation, petitioners filed written objections, accepted by the district court, and appeared at the July 7 hearing. Petitioners asked the court to reject the Settlement on the ground that the cash benefit to plaintiffs' lawyers was disproportionately high and the corporate governance "concessions" provided no material benefit to shareholders beyond what ADM had itself adopted a year earlier. Alternatively, petitioners asked the court to order the parties to show cause why corporate governance provisions should not be revised to require truly independent directors. Nevertheless, at the

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[7] Rule 23.1 provides in pertinent part that "[t]he action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

conclusion of the hearing the district court approved the Settlement. Petitioners appealed to the Seventh Circuit.

B. The Decision Below

The panel refused to hear petitioners' appeal, left them unable *ever* to appeal the collusive ADM settlement, overruled several circuit cases in the process, and expressly recognized that its decision created two direct conflicts with the considered decisions of other circuits.

1. In *Tryforos v. Icarian Development Co.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976), then-Judge Stevens held that "[t]he law is clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action." *Id.* at 1263 n.22. This view has been endorsed by other circuits. *See, e.g., Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993) (Scirica, J.); *Gottlieb v. Wiles*, 11 F.3d 1004, 1011 (10th Cir. 1993) (McKay, C.J.). It has been approved by leading commentators.[8] And some courts have even expressed displeasure at shareholder motions to intervene. *See, e.g., Webcor Elecs. v. Whiting*, 101 F.R.D. 461, 463 (D. Del. 1984) (complaining that motion to intervene was "superfluous procedural question" since nonparty objector already had standing to appeal).

With *Tryforos* as direct on-point authority guaranteeing nonparty objectors' right to appeal, and with so many other authorities in concurrence, petitioners did not seek

[8] *See, e.g.*, 7C Wright, *supra*, § 1839, at 182 (2d ed. 1986 & Supp. 1997) ("objector to the settlement may appeal the court's approval of the compromise"); 5 James W. Moore, *Moore's Federal Practice* ¶ 23.1.10[3] (3d ed. 1997) (same); 10 *Federal Procedure, Lawyers Edition* § 25:184, at 260 (1994) ("nonparty shareholder who appears, pursuant to an FRCP 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision without having been formally made a party to the action").

leave to intervene in the trial court. The Seventh Circuit panel, however, expressly overruled *Tryforos*, disagreed with the Third Circuit's decision in *Bell Atlantic*, and held formal intervention to be an absolute prerequisite to appeal. Pet. App. 1a-4a.[9]

The panel based its ruling almost entirely on a gloss of inessential language from this Court's intervening *per curiam* opinion in *Marino*. There the Court commented that it is "better practice" to require nonparties to intervene formally before allowing them to appeal. 484 U.S. at 304. From that single aside, the court of appeals inferred that both nonparty class members under Rule 23 and nonparty shareholders under Rule 23.1 *must always* intervene in order to appeal.

The panel stated that its conclusion required it to overrule *Tryforos* and split with other recent circuit decisions. Pet. App. 6a-7a (acknowledging that Third Circuit "has held, despite *Marino*, that a shareholder need not become a party in order to appeal from the final decision in derivative litigation"); *id.* at 2a ("[c]ourts have disagreed for several decades about whether class members (and shareholders, their counterparts in derivative actions under Rule 23.1) must intervene"); *id.* at 4a ("we now formally overrule . . . any . . . case in this circuit . . . that permits non-parties to appeal").

2. The court of appeals next turned to the question whether to apply its decision retroactively to petitioners. The court acknowledged that retroactive application of its intervention requirement would preclude petitioners from *ever* appealing the ADM settlement—and would do so despite the fact that they had followed all proper procedures under settled Seventh Circuit law at the time they appealed. *Id.* at 7a-10a.

[9] Pursuant to Seventh Circuit Rule 40(e), the panel overruled its prior precedent by circulating its opinion to all circuit judges in active service prior to its release. Pet. App. 10a.

The court concluded that it was bound to apply its new intervention requirement to CalPERS and SBA, unfairness notwithstanding, because of language in *Firestone* (and subsequently reiterated in *Budinich* and *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988)): "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone*, 449 U.S. at 379. Because this case "concern[ed] jurisdiction[al]" prerequisites to appeal, Judge Easterbrook reasoned, the court's new rule had to be applied retroactively to bar the appeal of CalPERS and SBA. Pet. App. 8a-9a.

The panel acknowledged that this second holding also overruled a Seventh Circuit precedent (*Snyder v. Smith*, 736 F.2d 409 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984)) and created another direct circuit split—this time with the Ninth Circuit's decision in *George v. Camacho*, 119 F.3d at 1399. Pet. App. 10a ("overrul[ing] *Snyder* and disagree[ing] with *George*"). Just last year the Ninth Circuit, sitting *en banc*, held that nothing in *Firestone* or its progeny required retroactive application of new jurisdictional rules where such application would bar appellants from ever raising their issues on appeal. *George*, 119 F.3d at 1399. Until this case, the Seventh Circuit had taken the same view, stating that *Firestone* "did not address the issue of whether an appellate court must dismiss the appeal where a party who relies on a jurisdictional ruling is, under a subsequent decision, foreclosed from ever raising his issues in the appellate court." *Snyder*, 736 F.2d at 415.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION CEMENTS A CIRCUIT SPLIT OF SIGNIFICANT IMPORTANCE TO ALL SHAREHOLDER DERIVATIVE SUITS, REFLECTS CONFUSION AMONG THE LOWER COURTS OVER THIS COURT'S DECISION IN *MARINO v. ORTIZ*, UNDERMINES THE PURPOSE AND DESIGN OF RULE 23.1 TO ENCOURAGE SHAREHOLDER PARTICIPATION, AND IGNORES TRADITIONAL COMMON LAW AND FEDERAL PRACTICE

As Judge Easterbrook noted, the lower federal courts are irreconcilably split over whether nonparty shareholders must intervene as parties in order to appeal adverse judgments. Pet. App. 2a. This split has substantial consequences for all nonparty shareholders and the vitality of the shareholder derivative suit process itself. It leaves objecting shareholders uncertain of their rights, effectively prevents *any* shareholder appeals in the Seventh Circuit, and invites forum shopping.

The Seventh Circuit reasoned that its ruling was compelled by this Court's *per curiam* decision in *Marino v. Ortiz*, 484 U.S. 301 (1988). But Judge Easterbrook acknowledged that the Third Circuit disagrees. Pet. App. 6a-7a (conceding disagreement with Third Circuit's view of *Marino*). The Third Circuit's view is correct. The court's decision below undermines the purposes of Rule 23.1, diverges from traditional common law and federal practice, and finds no support in *Marino*, which dealt only with the right of complete outsiders to contest a class action settlement between willing class members and the defendants.

A. The panel below virtually invited certiorari, noting at the outset of its opinion that "[c]ourts have disagreed for several decades about whether class members (and shareholders, their counterparts in derivative actions under Rule 23.1) must intervene as parties in order to appeal from adverse decisions." Pet. App. 2a. Resolution of

lower court disputes over questions of federal law is a central function of this Court's certiorari jurisdiction.

Nor can the split of authority be reconciled. The Third, Tenth, and (until now) Seventh Circuits have all approved nonparty shareholder appeals. *See, e.g., Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304; *Gottlieb v. Wiles*, 11 F.3d 1004; *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1985); *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258. The Seventh Circuit now demands formal intervention, in express "disagree[ment]" with these courts. Pet. App. 7a.[10]

The fracture has been compounded by a lone paragraph in *Marino*. *See* Pet. App. 1a-2a. Some courts, like

[10] This same split is mirrored in the context of Federal Rule of Civil Procedure 23 class actions. Several circuits hold that nonparty class members need not intervene before appealing. *See, e.g., In re PaineWebber Inc. Ltd. Partnerships Litig.*, 94 F.3d 49 (2d Cir. 1996); *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 713-14 (3d Cir. 1993); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 32 (3d Cir. 1971); *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Sertic v. Cuyahoga, Lake, Geauga & Ashtabula Counties Carpenters Dist. Council of United Bhd. of Carpenters & Joiners*, 459 F.2d 579 (6th Cir. 1972); *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1309 (9th Cir. 1982), *aff'd sub nom. Arizona v. United States District Court*, 459 U.S. 1191 (1983); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977).

Others hold that intervention is required. *See, e.g., Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554, 554 (5th Cir. 1993) ("[W]e have no jurisdiction to consider an appeal by a class member who has not attempted to intervene as a named party."); *Baylor v. United States Dep't of Hous. & Urban Dev.*, 913 F.2d 223, 225 (5th Cir. 1990); *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-74 (5th Cir. 1988); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 507 U.S. 908 (1993); *Shores v. Sklar*, 844 F.2d 1485, 1491, *vacated on other grounds*, 855 F.2d 722 (11th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987).

Whatever result the Court reaches in this case in the context of Rule 23.1 shareholder derivative suits will also provide much-needed guidance to the lower courts in the context of Rule 23 class actions.

the Seventh Circuit, read this passage as confirming (and even mandating) their decision to bar nonparty shareholder appeals. *See id.* Others see this language as horatory and not addressed to nonparty shareholders. *See, e.g., Bell Atlantic*, 2 F.3d at 1307, 1308 & n.6 (noting that *Marino* purported to describe "better practice" regarding appellants who were not even members of the affected class); *Gottlieb*, 11 F.3d at 1011 (adopting *Bell Atlantic*).[11] The intercircuit dispute over the effect of *Marino* provides further grounds for granting certiorari.[12]

B. The circuits' split over intervention has tremendous practical consequences for all nonparty shareholders and the integrity of the shareholder derivative suit process.

In some courts, nonparty shareholders have an absolute *right* to appeal any collusive settlement. In others, like the Seventh Circuit, their ability to appeal now turns on a purely *discretionary* decision by the trial court.[13] The

[11] *See also* 15A Wright, *supra*, § 3902.1, at 122 (2d ed. 1992) ("The justification for recognizing appeal standing in some of these [nonparty] cases is so compelling as to justify putting aside any formal requirement of intervention, though the 'better practice' is to seek intervention in the district court.") (quoting *Marino*); Timothy A. Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933, 946 (1993) ("[L]ower courts have not taken *Marino* as proffering an unqualified command; they have decided that a non-party may sometimes appeal without prior intervention.").

[12] Disagreement over *Marino* has also contributed to the split of authority over intervention in the Rule 23 class action context. *See, e.g., Walker*, 858 F.2d at 1074 (Fifth Circuit refusing nonparty class member appeal because of *Marino*); *Croyden*, 969 F.2d at 679-80 (same holding in Eighth Circuit). Thus, clarifying *Marino*'s meaning here will also contribute to resolving the class action split.

[13] Under Rule 24(b), "permissive intervention" is expressly left to the "discretion" of the trial court. Fed. R. Civ. P. 24(b). Even if intervention here is considered "of right" under Rule 24(a)(2), the district court is still granted wide discretionary power to determine whether "the applicant is so situated that the disposition of the action may as a practical matter impair or impede" its rights, and whether the applicant's interests are already

federal courts rarely disagree over a question so central to the administration of justice as the right to appellate review for an entire class of persons.

A key procedural safeguard against collusion and abuse is also at stake in the lower court's split. In all derivative litigation, strong economic incentives tempt plaintiffs' counsel and defendants to "structure a settlement such that the plaintiffs' attorneys' fees are disproportionate to any relief obtained for the corporation." *Bell Atlantic*, 2 F.3d at 1310.[14] Courts and commentators have long considered participation by nonparty shareholders in the judicial settlement review process to be a key procedural countermeasure for exposing and preventing such corruption.[15]

"adequately represented" by the parties. Fed. R. Civ. P. 24(a)(2). *See also Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995) (deciding whether to permit intervention "of right" requires trial court to apply four-part balancing test). Worse still, some courts have suggested that objecting shareholders' interests are necessarily "adequately protected" by party shareholders in Rule 23.1 suits. *See, e.g., In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.), *cert. denied*, 469 U.S. 858 (1984).

[14] *See also id.* at 1309 n.8 & 1310 n.10 (citing, *inter alia*, Richard A. Posner, *Economic Analysis of Law* § 21.9, at 570 (4th ed. 1992) (plaintiffs' attorney "will be tempted to offer to settle with defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant provided the sum of the two figures is less than the defendant's net expected loss from going to trial"); Romano, 7 J.L. Econ. & Org. at 57 (combination of differential indemnification rights, insurance policy exclusions, plaintiffs' counsel's interest in fees, and individual defendants' risk aversion creates powerful and potentially perverse incentives to settle); Coffee, 86 Colum. L. Rev. at 677 (derivative suits "are uniquely vulnerable to collusive settlements that benefit plaintiff's attorneys rather than their clients")).

[15] *See, e.g., Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532 n.7 (1984) ("[T]he provision requiring notice and court approval of settlements [is] also intended to prevent shareholders from suing in place of the corporation in circumstances where the action would disserve the legitimate interests of the company or its shareholders."); *Papilsky*, 466 F.2d at 258 ("[n]otice is essential in these situations to ensure that the [resolution] of the derivative suit is

Replacing nonparty shareholders' longstanding *right* to appeal a settlement on the merits with a discretionary *chance* to appeal reduces their ability to serve that monitoring function. It also raises the costs (and thus reduces the likelihood) of their participation. Simply to provide their views on the fairness of a settlement, nonparty shareholders are faced with the substantial added financial burden of litigating an intervention motion (and possibly an appeal of the district court's denial of leave to intervene).

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in the best interests of the corporation and the absent stockholders") (citations omitted); *Wolf v. Barkes*, 348 F.2d 994, 996 n.2 (2d Cir.) (Friendly, J.) (that ensuring nonparty oversight and participation "was the objective" of the Rule "is indicated by the [1937] Advisory Committee's citation of McLaughlin, Capacity of a Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421, 430 (1936)," in its commentary to what was then Rule 23(c), now Rule 23(e)), *cert. denied*, 382 U.S. 941 (1965); *Bell Atlantic*, 2 F.3d at 1310 ("objectors play an important role by giving courts access to information on the settlement's merits"); *In re Pittsburgh & Lake Erie R.R. Co. Sec. & Antitrust Litig.*, 543 F.2d 1058, 1069-70 (3d Cir. 1976) (holding that nonparties may appeal where their "equity is being diluted," since their "distinctive interests are as worthy of consideration and protection as [party] shareholders"); *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942) (nonparty shareholder participation key "in order that the court may have the benefit of that broader information which comes from receiving advice as to the views of all parties concerned"); *Craftsman Fin. & Mortgage Co. v. Brown*, 64 F. Supp. 168, 178 (S.D.N.Y. 1945) (nonparty shareholder participation key to remedy the "evil" of "private settlements under which the plaintiff stockholder and his attorney got the sum paid in settlement, and the corporation got nothing"); *Stepak v. Tracinda Corp.*, Civil Action No. 8457, 1989 WL 100884, at *1 (Del. Ch. Aug. 18, 1989) (objectors' "ardent[] resist[ance] [to] the settlement" persuaded court "to look more closely at the proposal than would ordinarily be the case"; as a result of objector participation, court concluded there was "no reasonable likelihood that the proposed settlement would be approved as fair and reasonable"), *appeal refused*, 567 A.2d 424 (Del. 1989) (Table); 7C Wright, *supra*, § 1839, at 175 (nonparty shareholder participation "is intended to discourage the private settlement of a derivative claim under which a shareholder-plaintiff and his attorney personally profit to the exclusion of the corporation and the other shareholders"); Note, *Control Over Settlement of Shareholder's Suit*, 54 Harv. L. Rev. 833 (1941).

They are faced, too, with all the costs and inconveniences associated with party status, including wide-ranging automatic disclosure obligations and the obligation to respond to interrogatories, appear for deposition, and answer virtually unlimited demands for documents. Increasing barriers to (and costs of) nonparty participation concomitantly increases the parties' incentives to collude—as well as the likelihood that flawed settlements will survive judicial scrutiny.[16]

Resolution of this split is important for other reasons. Under current law, whether intervention is required differs from jurisdiction to jurisdiction, leaving shareholder litigants uncertain of their appellate rights and the procedures they need to follow to preserve those rights. Failing to bring a formal motion to intervene is a fatal error in some courts; in others, such a motion is treated as an unwelcome and wasteful formalism. *Cf. Webcor Elecs.*, 101 F.R.D. at 463; *see* p. 8, *supra*.[17] Further, in circuits where nonparties can appeal only after intervening, they are typically notified of their right to object and participate only *after* the parties have reached a tentative settlement. *See* note 7, *supra*. Yet, settled law in the Seventh Circuit and elsewhere strongly *disfavors* intervention after a tentative settlement is reached.[18] As a practical matter, the intervention requirement makes appeal of

[16] Many commentators have already called on Congress for abolition of derivative suits as too prone to collusion. *See* Pet. App. 6a (citing articles). This view is also expressed in the panel's decision below. *Id.*

[17] Worse still, even when shareholders carefully follow all applicable law in jurisdictions that do not require intervention, they risk being whipsawed (like petitioners here) by the court of appeals reversing itself, changing sides in the ongoing split, and foreclosing a shareholder appeal that was proper under prior law.

[18] *See, e.g., Farmland Dairies v. Commissioner of New York State Dep't of Agric. & Markets*, 847 F.2d 1038, 1043-44 (2d Cir. 1988); *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923 (5th Cir. 1984); *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991), *cert. denied*, 502 U.S. 1035 (1992).

a flawed derivative settlement highly unlikely, if not impossible.

Finally, shareholder derivative suits are amenable to jurisdiction almost anywhere in the United States (plaintiffs' attorneys can usually find a shareholder willing to serve as plaintiff in the jurisdiction of choice). The current, chaotic state of the law encourages a perverse form of forum shopping. Those seeking quick, quiet (and collusive) derivative settlements that benefit them—and not the company—will have a strong incentive to file where intervention is required and where appellate review of any collusive settlement is therefore unlikely.

C. The Seventh Circuit's shareholder intervention mandate is wrong as a matter of law. Its error directly affects the quality of the judicial oversight and review process in the many derivative actions handled by the federal courts.

Under Rule 23.1, nonparty shareholders are entitled to appear and contest any proposed settlement; unlike purely private suits, intervention is not required for nonparties to participate in the trial court. Rule 23.1 was deliberately drafted in this manner to encourage maximum nonparty shareholder participation. "[O]bjectors play an important role by giving courts access to information on the settlement's merits." *Bell Atlantic*, 2 F.3d at 1310; *Papilsky*, 466 F.2d at 258 (shareholder participation is "essential in these situations to ensure that the [resolution] of the derivative suit is in the best interests of the corporation and the absent stockholders"); *see also* authorities cited at note 15, *supra*.

The Seventh Circuit's newly fashioned rule is inconsistent with the purposes of Rule 23.1. It raises the costs for nonparties to participate, reduces their ability to appeal, and creates new incentives to collude. It also reduces the likelihood that the court of appeals will have all the information necessary to assess the fairness of a settlement. The Third Circuit expressly refused to mandate intervention for just these reasons. *Bell Atlantic*, 2 F.3d

at 1310 (Rule's goal of preventing collusive settlements "cautions against creating obstacles to challenging derivative action settlement agreements"). *See also Gottlieb*, 11 F.3d at 1011 (same); Duffy, 60 U. Chi. L. Rev. at 951 (requiring intervention is inconsistent with "the rule that encourages settlement to a reasonable degree, and also encourages fair settlements").

The Seventh Circuit's decision is also in tension with common law practice. *See generally* Duffy, 60 U. Chi. L. Rev. at 942. English legal scholar Fredric Calvert argued as early as 1846 that the British common law had already provided unnamed class members the right to appeal for over a hundred years. *See id.* at 940-41 (discussing Frederic Calvert, *Observations on Suits in Equity* 38 (William Benning, 2d ed. 1846)). And Calvert himself defended this right at length: "[T]he privilege of appeal [in class action suits] ought to be given in such a manner as to induce the readiest acquiescence in the system of representation during the earlier part of the suit; for which reason every individual ought, as it appears to me, to . . . have the power of appealing, whether he has been a suitor . . . or by some other person as his representative." *Id.* In America, Joseph Story reiterated Calvert's position in his *Commentaries on Equity Pleadings*, arguing that, where affected individuals are too numerous to appear in court, "they may come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." *Id.* at 941 (quoting Joseph Story, *Commentaries on Equity Pleadings* 96 (Little, Brown, 2d ed. 1840)).

The Seventh Circuit rested its decision not on any disagreement over the importance of nonparty oversight, any different view about Rule 23.1's purpose, or any contrary understanding of common law practice. Instead, it concluded that three sentences from *Marino* controlled:

> The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled. The Court of Appeals suggested that there may be exceptions to this general rule, primarily "when the nonparty has an interest that is affected by the trial court's judgment." We think the better practice is for such a nonparty to seek intervention for purposes of appeal . . . .

484 U.S. at 304 (citations omitted).

The Seventh Circuit's single-minded reliance on *Marino* is misplaced.

First, the quoted language is unnecessary to *Marino*'s *per curiam* holding. It discusses only "better practice," and does not set out an exceptionless rule for all cases. Other courts and leading commentators have recognized this point. *See, e.g., Bell Atlantic*, 2 F.3d at 1307; note 11, *supra*.

Second, the nonparties seeking to appeal in *Marino* were not even members of the class at issue, but outsiders with no right to participate in trial court proceedings under Rule 23. They were white police officers seeking to challenge a class action settlement between black officers and the police authorities. Nothing in *Marino* addressed the appellate rights of nonparties who *are* members of the class whose rights *are* directly affected by any judgment entered in the case, and who have an express right under the federal rules to participate in trial court proceedings without intervention. *Bell Atlantic*, 2 F.3d at 1308 n.6.

The lone case cited in the pertinent passage in *Marino* confirms this conclusion. *United States ex rel. Louisiana v. Jack*, 244 U.S. 397 (1917), cited in *Marino*, 484 U.S. at 304, involved a land dispute between a state agency and a landowner; the State of Louisiana sought to participate in the proceedings. The Court held the State not a proper party and explained that "it has long been the law" that "part[ies] *and priv*[*ies*] *to the record*" may appeal an adverse decision, though even to this rule the Court acknowledged some "exceptions." 244 U.S. at 402 (emphasis added). There is no doubt that nonparty share-

holders are at least "privy to the record" in derivative suits.[19]

Third, if *Marino held* that "only parties to a lawsuit, or those that properly become parties, may appeal" (484 U.S. at 304), much settled law would have to be overturned. Nonparties affected by trial court judgments are treated by the federal courts as "de facto" parties and permitted to appeal without intervention in a "surprising range" of circumstances. 15A Wright, *supra*, § 3902.1, at 102.[20] For instance, federal courts routinely permit nonparty appeals from judgments that bind the nonparty by name. *Id.* at 122 (citing cases).[21] They permit nonparty witnesses held in contempt for refusing discovery to appeal on claims of privilege, lack of personal jurisdiction, and other matters. *See* 15A Wright, § 3902.1, at

[19] The Seventh Circuit virtually conceded as much. Pet. App. 7a ("The third circuit conceived of the question as whether the shareholder has standing, which is misleading. Standing means injury in fact, and a reduction in the market price of one's stock is injury.").

[20] *See id.* at 122 (collecting examples and commenting that "Nonparties need not always go through a formal intervention procedure to achieve standing to appeal. Appeals have been permitted on showings that range from easy cases in which a nonparty is formally addressed by a court order through less clear cases in which a nonparty is significantly affected.").

[21] *See also United States v. International Bhd. of Teamsters*, 931 F.2d 177, 183-84 (2d Cir. 1991); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 194 n.12 (3d Cir. 1990); *In re Grand Jury Proceedings*, 654 F.2d 268, 270-71 (3d Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Thompson v. Freeman*, 648 F.2d 1144, 1147 n.5 (8th Cir. 1981); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277-78 (9th Cir.), *cert. denied*, 506 U.S. 953 (1992); *EEOC v. Pan American World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir.), *cert. denied*, 498 U.S. 815 (1990); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1546-47 (9th Cir. 1989); *SEC v. Wencke*, 783 F.2d 829, 834 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1354 (10th Cir. 1972).

124.[22] They regularly allow attorneys and expert witnesses to appeal district court denials of fees. *See* 15A Wright, § 3902.1, at 126 & n.45.[23] And nonparties obligated to reimburse the defendant for amounts paid under the trial court's judgment are also heard on a routine basis. *See* 15A Wright, § 3902.1, at 127 & n.47.[24] There is nothing in *Marino* to suggest that its reference to "better practice" was intended to sweep away such a vast body of federal law. Nor is there any basis in *Marino* or the Seventh Circuit's decision to justify denying injured nonparty shareholders the right to appeal when these other nonparties are routinely heard.

Beyond *Marino*, the only other authority the Seventh Circuit cited for terminating nonparty shareholder appeals is Federal Rule of Appellate Procedure 3(c). Pet. App. 2a. Rule 3(c), the panel emphasized, provides that "[a] notice of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." (emphasis added).

[22] *See also United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *General Ins. Co. of Am. v. Eastern Consolidated Utils., Inc.*, 126 F.3d 215, 218 (3d Cir. 1997); *United States v. Bertoli*, 994 F.2d 1002, 1012 (3d Cir. 1993); *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 n.2 (5th Cir. 1988); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992); *Norwood v. Slammons*, 788 F. Supp. 1020, 1024 (W.D. Ark. 1991).

[23] *See also Angoff v. Goldfine*, 270 F.2d 185, 186 (1st Cir. 1959); *Lipscomb v. Wise*, 643 F.2d 319, 320-21 (5th Cir. 1981); *Price v. Pelka*, 690 F.2d 98, 102 (6th Cir. 1982); *Preston v. United States*, 284 F.2d 514, 515 n.1 (9th Cir. 1960); *United States v. Tippett*, 975 F.2d 713, 718 (10th Cir. 1992); *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 424 (10th Cir. 1979); *James v. Home Constr. Co. of Mobile, Inc.*, 689 F.2d 1357, 1359 (11th Cir. 1982).

[24] *See also Fields v. Blum*, 629 F.2d 825, 827 (2d Cir. 1980) (order enjoining reduction of welfare benefits by city official could be appealed by state, since state was legally required to reimburse city for payments and controlled both the activities complained of and the conduct of local officials).

Because no party is taking the appeal here, the Seventh Circuit reasoned, it must be improper under Rule 3(c). *Id.*

This is far too thin a reed on which to rest such a weighty result. The Seventh Circuit's reading of Rule 3(c) would bar not just nonparty shareholder appeals, but *all* nonparty appeals, a distinctly unlikely result given longstanding acceptance of such appeals. *See* notes 21-24, *supra*. Besides, Rule 3(c) hardly purports to delineate what matters are inherently eligible or ineligible for appeal. That is the domain of Article III jurisprudence and 28 U.S.C. § 1291, neither of which purports to restrict appellate jurisdiction to parties alone.[25] On its face, Rule 3(c) is concerned only with the formal "content[s] of the notice of appeal." It simply ensures that sufficient information appears on the face of the notice for the court of appeals to discern the issues and litigants before it.[26]

The Seventh Circuit also ignored further language in Rule 3(c), which provides that

> [i]n a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as the representative of the class.

Fed. R. App. P. 3(c). This Court has itself held that Rule 3(c) permits Federal Rule of Civil Procedure 23 class members to appeal if the named plaintiff chooses not to do so. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). Intervention is nowhere discussed in the Rule as a prerequisite to such appeals.

Finally, there is no indication that Rule 3(c)'s drafters ever intended it to preclude any nonparty appeals. To the

[25] In fact, section 1291 never mentions the words "party" or "parties" anywhere in its text. *See* Pet. App. 22a.

[26] "**(c) Content of the Notice of Appeal.**—A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.' . . ." Fed. R. App. P. 3(c).

contrary, the 1967 Advisory Committee Notes indicate that the Rule "merely restate[s], in modified form, provisions now found in the civil and criminal rules . . . and decisions under the present rules which *dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules.*" 28 U.S.C. App. at 589 (emphasis added). The 1979 Advisory Committee Notes reemphasize the same point. *Id.* at 590 ("so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with"). In all events, contrary to the Seventh Circuit's opinion, a nonparty shareholder *can* strictly comply with the Rule's language simply by "specify[ing]" that no party is taking the appeal, and "naming each [nonparty] appellant in either the caption or the body of the notice of appeal."

II. THE SEVENTH CIRCUIT'S DECISION TO APPLY ITS RULING RETROACTIVELY CREATES ANOTHER CIRCUIT SPLIT, RAISES SIGNIFICANT QUESTIONS OF FEDERAL LAW, AND IS BASED ON A MISTAKEN PREMISE THAT WRONGLY INSULATES FROM APPELLATE SCRUTINY A PLAINLY COLLUSIVE SETTLEMENT IN ONE OF THE MOST SIGNIFICANT SHAREHOLDER DERIVATIVE SUITS

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), Chief Justice Rehnquist and Justice O'Connor commented that "[t]his Court's retroactivity jurisprudence has become somewhat chaotic in recent years." *Id.* at 113 (O'Connor, J., & Rehnquist, C.J., dissenting). This case raises a question arising from the Court's "somewhat chaotic" retroactivity jurisprudence that has split the courts of appeals. It is a question, as well, that the Seventh Circuit wrongly resolved in a manner that permanently insulates from appellate scrutiny a derivative settlement affecting millions of shareholders nationwide in an egregious case of criminal corporate behavior. All of these factors further compel this Court's review.

A. In the decision below, the Seventh Circuit took the position that *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 379, and its progeny forbid courts from giving purely prospective effect to any new rule "concern[ing] jurisdiction." Pet. App. 8a-9a. Accordingly, the court applied its new rule retroactively against petitioners, dismissing their appeal on the ground that they had not complied with the court's newly formulated intervention requirement. The court did so after acknowledging that petitioners had fully complied with settled Seventh Circuit appellate procedures at the time they appealed, and that retroactive application meant they would *never* be able to obtain appellate review of the ADM settlement. *Id.* at 7a-10a.

Judge Easterbrook noted that the panel's holding is in direct conflict with the Ninth Circuit's recent *en banc* decision in *George v. Camacho*, 119 F.3d 1393. Pet. App. 10a (conceding "disagree[ment] with *George*").[27] Like petitioners here, the appellant in *George* had relied on settled circuit authority (namely, precedent holding that litigants in the Northern Mariana Islands are afforded a seven-day extension for filing notices of appeal). 119 F.3d at 1395-96. As here, the Ninth Circuit concluded that its prior holding was erroneous. *Id.* But, unlike here, the Ninth Circuit refused to apply its new jurisdictional ruling retroactively to an appellant who had faithfully followed existing circuit law at the time of her appeal. *Id.*

The Ninth Circuit considered *Firestone* but, unlike the Seventh Circuit, found nothing in it mandating retroactivity:

> What underlay the Court's decision in *Firestone* was the need to ensure that litigants would not engage in piecemeal litigation, clogging the circuit courts with interlocutory appeals. . . . Applying the rule retroactively clearly advanced that objective by postponing consideration of pending interlocutory appeals until

[27] The majority in *George* included Chief Judge Hug and Judges Browning, Fletcher, Pregerson, Reinhardt, Thompson, and Hawkins.

> after final judgment. There was thus no question in *Firestone* of forfeiting anyone's right to appeal permanently. The circumstances here are entirely different.

Id. at 1397-98. The majority was joined in this view by two dissenters, Judges Kozinski and O'Scannlain, who agreed that "[a] fair and sensible solution would be to give the benefit of the error to anyone who actually relied on it. . . . This would balance appellees' interest in finality with the reliance interest of those appellants who followed our misstatement in [the prior case granting a seven-day extension]." *Id.* at 1410.[28]

The Tenth Circuit in *Pettyjohn v. Shalala*, 23 F.3d 1572 (1994), has also held, in conflict with the decision here, that nothing in *Firestone* requires retroactivity in jurisdictional disputes where appellants would be barred from ever raising their issues before a court of appeals. *Id.* at 1575. Before this case, moreover, the Seventh Circuit had taken the same position as the Ninth and Tenth Circuits. Pet. App. 10a ("overrul[ing] *Snyder*," which had held that *Firestone* simply does "not address the issue of whether an appellate court must dismiss the appeal where a party who relies on a jurisdictional ruling is, under a subsequent decision, foreclosed from ever raising his issues in the appellate court," 736 F.2d at 415).

B. Though the courts of appeals sharply differ over *Firestone*'s scope, they agree that the issue dividing them raises important questions for the administration of justice and access to the federal courts.

If the Ninth and Tenth Circuits (and the Seventh Circuit in *Snyder*) are correct and courts may apply jurisdictional rulings only prospectively, the Seventh Circuit has set itself on a course that will systematically deny

[28] These dissenters simply took issue with whether the appellant in *George* had in fact relied on the court's prior decision or had simply been neglectful. 119 F.3d at 1410. There is no question in this case, and no suggestion in the record, that petitioners have acted in any neglectful fashion.

substantive review to valid appeals; litigants relying on settled law overturned in their own cases will be barred from ever arguing their issues on appeal. This result is obviously inequitable to an entire class of litigants, and it directly undercuts the judiciary's strong interest in promoting reliance on settled law. *George*, 119 F.3d at 1397 ("The consequence of such a holding would be that litigants who complied with our rules . . . would lose their rights to appeal, . . . a result that would appear to be unconscionable to most reasoning persons whether learned in the law or not."); *Snyder*, 736 F.2d at 415 (such a holding would be "obviously unfair"; " 'it would be inequitable for an appellate court to decline to hear the appeal' ") (citation omitted).

This result also creates a bizarre incentive for litigants to file every conceivable paper and motion—even those already expressly ruled wasteful and superfluous—solely as an insurance policy against a possible change in law. *George*, 119 F.3d at 1404 ("Rules are intended to provide certainty and to guide parties' actions. Making a [jurisdictional] rule . . . retroactive [in all cases] is inconsistent with both of these objectives.") (footnote omitted).

By contrast, if the Seventh Circuit is right and *Firestone* mandates retroactive application of all new jurisdictional rules, the Ninth Circuit has lawlessly arrogated power to hear appeals over which it has no valid jurisdiction. Indeed, the Seventh Circuit below chided the Ninth Circuit on precisely these grounds.[29]

C. As a result of the Seventh Circuit's decision, lawyers will keep all of the meager $8 million ADM settlement; the company and its millions of shareholders will receive no meaningful reforms and not one dime from

[29] "The proposition that 'a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists' requires us to overrule *Snyder* and disagree with *George*. Jurisdiction means adjudicatory power. Equitable considerations are altogether irrelevant when a court lacks adjudicatory power." Pet. App. 10a (citation omitted).

fiduciaries guilty of gross abuses of trust. All of this will take place, moreover, without any appellate review and as a result of a clear error of law.

The Seventh Circuit rested its decision on the premise that, once a court has determined that it lacks jurisdiction, it is powerless to reach the merits of the case no matter how inequitable that may be. "[A] court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." Pet. App. 10a (internal quotation marks omitted).

That premise, however, is unsupported. The Seventh Circuit plainly *did* have "adjudicatory power" to hear petitioners' appeal. The panel never suggested that it lacked statutory or constitutional authority to entertain nonparty shareholder appeals. Nothing in the language of 28 U.S.C. § 1291 or practice under that section even hints that appeals are limited to formal parties. *See* Pet. App. 22a (text of section 1291); notes 21-24, *supra* (documenting longstanding practice of permitting nonparty appeals in federal appellate courts). Nothing in the Federal Rules of Appellate Procedure precludes nonparty shareholder appeals. *See* Point I.C, *supra*. And it is beyond dispute that petitioners, among ADM's largest shareholders, have standing under Article III.[30]

Given the undisputed *presence* of constitutional and statutory "adjudicatory authority," the Seventh Circuit's ruling below can most generously be described as a *prudential* decision. It reflects a policy decision akin to the judicially created prudential standing doctrine,[31] not any

[30] Judge Easterbrook himself conceded that petitioners have constitutional standing in the course of criticizing the Third Circuit's decision in *Bell Atlantic*. *See* note 19, *supra* (quoting Pet. App. 6a-7a).

[31] *See, e.g., Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997) ("In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.' Like their constitutional counterparts, these 'judicially self-imposed limits on the exercise of federal juris-

outside constraint on the courts' authority. There was no reason why the court of appeals could not have at least *considered* whether to apply this purely prudential rule prospectively. The court's suggestion that it lacked "adjudicatory power" to weigh such an option lacks any basis in law or common sense.

In any event, even if the court of appeals' "jurisdictional" ruling had affected the power of the court under statutory or constitutional law, its decision still could not be squared with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). There the Court held Congress's grant of jurisdiction to bankruptcy courts *unconstitutional*. Nonetheless, the Court applied *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Court concluded that, because its ruling "could produce substantial inequitable results," *id.* at 106-07, it should apply its decision only prospectively; the bankruptcy courts—though determined to lack any constitutional power—were thus allowed to retain cases already pending before them. 458 U.S. at 88-89 (plurality opinion); *id.* at 91-92 (Rehnquist, J., concurring in the judgment). If the bankruptcy courts could properly hear pending cases over which they had no *constitutional* authority, the Seventh Circuit's conclusion that it is "powerless" to apply *Chevron Oil*'s balancing test is hardly convincing. The Seventh Circuit did not address *Northern Pipeline* in its opinion.[32]

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diction' are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society,' but unlike their constitutional counterparts, they can be modified or abrogated by Congress.") (citations omitted); *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) (same).

[32] The Seventh Circuit also suggested that *Chevron Oil*, 404 U.S. 97, had itself been "overruled" by *Harper*, 509 U.S. 86, and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Pet. App. 8a. But this is simply not so. The splintered decisions in *Harper* and *Beam* held only that when a court decides to apply a new rule of law retroactively to the parties before it, it must also apply that same rule retroactively to all cases still open on direct review; selectively applying the new rule only to litigants at hand while retaining the old rule for all other pending cases is not permitted. Nothing in these decisions "overruled" a court's ability to consider under *Chevron Oil* whether to apply a new rule of civil law only prospectively.

The Seventh Circuit rested instead on one of *Firestone*'s recent progeny, *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 203. There the Court did apply a new rule of law retroactively even though doing so meant, as here, "that the losing party could never appeal." Pet. App. 9a. Because the Supreme Court there applied a jurisdictional ruling retroactively in the face of potentially inequitable consequences, the court of appeals reasoned that "*Budinich* . . . washes away the distinction we drew in *Snyder*" and any suggestion that the court of appeals remains empowered to consider prospective decisionmaking in cases "concern[ing] jurisdiction." *Id.*

The Seventh Circuit's reliance on *Budinich* is mistaken for three reasons. *First*, and most significantly, the Court in *Budinich* was called upon to render a decision concerning the court of appeals' *statutory* authority under 28 U.S.C. § 1291.[33] Its decision to apply its ruling concerning the courts' *statutory* jurisdiction retroactively has no bearing on the question whether the panel below was bound to apply its *prudential* decision retroactively.

Second, because *Budinich* announced no new rule of law, it was not eligible for purely prospective application. *See Harper*, 509 U.S. at 111 (Kennedy, J., concurring) (a decision cannot be made nonretroactive unless it "overrul[es] clear past precedent on which litigants may have relied" or "decid[es] an issue of first impression whose resolution was not clearly foreshadowed"). Instead, as the Ninth Circuit has pointed out, *Budinich* merely reaffirmed what "should have been apparent from the Court's previous decisions"—namely that a judgment is final and appealable under section 1291 after adjudication on the

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[33] 486 U.S. at 199 ("The question before us . . . is whether a decision on the merits is a 'final decision' as a matter of federal law under § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined.").

merits and does not await determination of attorneys' fees. *George*, 119 F.3d at 1398; *id.* (*Budinich* "did not change the applicable law"; it "did not conflict with or overrule any previously established law; nor did it subject Budinich to a rule that was different from the rule in effect at the time he acted").

Third, even supposing *Budinich* had effected a change in law, the petitioner in *Budinich* relied on no existing authority and ignored multiple warning signals from the Supreme Court that her position was wrong. Whatever "inequitable results" under a *Chevron Oil* analysis might conceivably flow from retroactive application against the petitioner in *Budinich* simply cannot be compared to those in this case. *See George*, 119 F.3d at 1398 (applying rule prospectively after *Chevron Oil* test and distinguishing *Budinich* because, as here, "the new rule [in *Budinich*] did not wipe out any rights [the petitioner] had established under a former version of the rule").[34]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[34] *See also id.* at 1410 (Kozinski & O'Scannlain, JJ., dissenting) ("A fair and sensible solution would be to give the benefit of the error to anyone who actually relied on it. . . . This would balance appellees' interest in finality with the reliance interest of those appellants who followed our misstatement in [the prior case].").

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 97-2829

PAUL FELZEN, Trustee of Louise Laskin Trust—1991, and SANDRA ESNER,
Plaintiffs-Appellees,

v.

DWAYNE O. ANDREAS, *et al.*,
Defendants,

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and FLORIDA STATE BOARD OF ADMINISTRATION,
Objectors-Appellants.

Submitted Sept. 19, 1997
Decided Jan. 21, 1998

Before POSNER, Chief Judge, and FLAUM and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

"The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled. The Court of Appeals suggested that there may be exceptions to this general rule, primarily 'when the nonparty has an interest that is affected by the trial court's judgment.' We think the better practice is for such a non-

party to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 587-88, 98 L.Ed.2d 629 (1988) (citations omitted). With these words the Supreme Court held that a person adversely affected by the settlement of a class action may appeal from the consent decree based on that settlement only if he has intervened as a party. See also Fed. R.App. P. 3(c): "A notice of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." (Emphasis added.) Following *Marino* we held that a class member in an action under Fed. R. Civ. P. 23 who has not become a party may not appeal from an order granting summary judgment to the defendant. *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir.1997). Today we consider another proposed exception to the rule stated in *Marino*.

Courts have disagreed for several decades about whether class members (and shareholders, their counterparts in derivative actions under Rule 23.1) must intervene as parties in order to appeal from adverse decisions. See Comment, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U.Chi.L.Rev. 933 (1993). Until *Marino* this circuit permitted class members and stockholders to appeal, whether or not they had intervened, provided they had informed the district court of their objections to the decision that disadvantaged them. See *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir.1970) (class action); *Tryforos v. Icarian Development Co.*, 518 F.2d 1258, 1263 n. 22 (7th Cir.1975) (shareholders' derivative suit). We held in *Brand Name Prescription Drugs* that in light of *Marino* and *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir.1992), *Asgrow Seed* is no longer authoritative. 115 F.3d at 458. But two shareholders who have appealed from the district court's approval of a settlement in this

derivative action ask us to apply *Tryforos* notwithstanding intervening precedent and the language of Rule 3(c).

Tryforos did not analyze the question now before us—whether shareholders who are not parties to a Rule 23.1 action nonetheless may appeal—but stated that their right to so do is "clear". Footnote 22 in *Tryforos* cites one case from the 1940s that permits such appeals, but that opinion did not give reasons. (*Tryforos* also cites one district court opinion from the 1960s, an odd reference for a rule of appellate jurisdiction.) An unexplained practice does not offer shelter from a later opinion of the Supreme Court holding that only parties may appeal, and withdrawing from the appellate courts any exception-making power. The two shareholder-appellants offer a number of arguments in support of appeal without intervention that boil down to a claim that erroneous decisions should be reversed, but arguments of this stripe do not justify omitting the step of intervening as a party. A court of appeals is not an ombudsman. Suppose the settlement of a derivative action induces the corporation to fire its CEO, or to curtail its purchases of fax machines, or to choose a different law firm. The affected employees, vendors, and lawyers could not appeal just because they believed the settlement improvident or the judge's action in approving it legally erroneous. Only parties may appeal. So too with shareholders, who have no more right to speak for the firm or control its litigation decisions than bondholders or banks or landlords, all of whom have contractual interests that may be affected by litigation. It may be, as appellants stress, that some district judges would not be receptive to attempts to intervene for the purpose of appeal, but the Supreme Court spoke to this in *Marino* when observing that a denial of a motion to intervene is itself appealable.

According to appellants, *Brand Name Prescription Drugs* did not actually jettison the approach of *Asgrow Seed* even for class actions. The question at issue in *Brand Name Prescription Drugs* was whether class mem-

bers (other than the named representatives) could appeal from an order granting summary judgment, while *Asgrow Seed* and today's case involve an appeal from an order approving a settlement. *VMS Limited Partnership*, while dismissing the appeal at hand, remarked in a footnote that the decision did not disturb *Asgrow Seed*. 976 F.2d at 368 n. 8. That is technically so; neither *VMS Limited Partnership* nor *Brand Name Prescription Drugs* involved an appeal from an order approving a settlement. But the distinction is inconsequential for purposes of Rule 3(c), the rationale of *Marino*, and the rationale of *Brand Name Prescription Drugs*: that the court should not "fragment the control of the class action" (115 F.3d at 457) by allowing class members to usurp the role of the class representative without persuading the district judge that the representative is unfit or unfaithful, or that subclasses should be created. See also *Shults v. Champion International Corp.*, 35 F.3d 1056, 1060-61 (6th Cir.1994); *Gottlieb v. Wiles*, 11 F.3d 1004, 1010-12 (10th Cir. 1993). Lest doubt linger, we now formally overrule *Asgrow Seed* and any other case in this circuit (including *Armstrong v. Board of School Directors*, 616 F.2d 305, 327-28 (7th Cir.1980), and *Patterson v. Stovall*, 528 F.2d 108, 109 n. 1 (7th Cir.1976)) that permits non-parties to appeal from a decision of any kind in a class action.

Well, then, is a shareholders' derivative action under Rule 23.1 different from a class action under Rule 23 in a way that permits appeal by nonparties? Not so far as Rule 3(c) or *Marino* is concerned. Although there are differences between class actions and derivative suits, these cut against the appellants' position. All class members are identical in entitlement to litigate; which injured persons become the representatives, and which the "mere" class members, is to a degree fortuitous and to a degree dependent on the entrepreneurial activity of the class counsel. It is the fact that each class member has a real grievance with the defendant that sets up at least an equitable argument for a class member who wants to appeal. But in a

shareholders' derivative action, the individual investor is not an injured party and is not entitled to litigate. A derivative suit is brought by an investor in the corporation's (not the investor's) right to recover for injury to the corporation. *Frank v. Hadesman & Frank, Inc.*, 83 F.3d 158 (7th Cir.1996); *Kagan v. Edison Brothers Stores, Inc.*, 907 F.2d 690 (7th Cir.1990). The corporation obtains the damages; the investor-plaintiffs just get the ball rolling after the fashion of a *qui tam* action. Only when the corporation's board defaults in its duty to protect the interests of the investors is this step permitted, and even then many states permit the board to regain control of the litigation following a special investigation. See *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991); American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* §§ 7.01, 7.03, 7.05 (1992). If in the course of managing or settling derivative litigation investors receive new injury, they do so only because the corporation becomes worse off—but loss to the corporation does not permit stockholders to sue directly. See *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333 (7th Cir.1989). Once again the corporation holds the legal claim, and it acts through the board of directors. Stockholders may *replace* the board if dissatisfied with its performance, but they may not *displace* the board in litigation. So it cannot be surprising that stockholders other than the named plaintiffs are not treated as parties in derivative litigation—their citizenship is ignored when determining diversity, see *Smith v. Sperling*, 354 U.S. 91, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957), and they are not allowed to opt out. Corporate management may affect the interests of stockholders without notifying them or obtaining their consent; by investing in stock, they placed their funds at the management's disposal and obtained, in exchange, the right to choose future managers. Shareholders have no more the attributes of parties when managers settle derivative litigation than when managers settle antitrust

litigation. (This particular derivative suit arose out of claims that managers of Archer Daniels Midland Co. conspired with rival sellers and thus exposed the firm to criminal and treble-damages liability for conspiracy in restraint of trade.)

Rule 23.1 provides for notice to shareholders only in the event of dismissal or settlement, so that other investors may contest the faithfulness or honesty of the self-appointed plaintiffs; we do not doubt that this monitoring is often useful and that intervention to facilitate an appeal could be justified. Many thoughtful students of the subject conclude, with empirical support, that derivative actions do little to promote sound management and often hurt the firm by diverting the managers' time from running the business while diverting the firm's resources to the plaintiffs' lawyers without providing a corresponding benefit. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L.Rev. 497 (1991); Reinier Kraakman, Hyun Park & Steven Shavell, *When are Shareholder Suits in Shareholder Interests?*, 82 Geo. L.J. 1733 (1994); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. Econ. & Org. 55 (1991); Mark L. Cross, Wallace N. Davidson & John H. Thornton, *The Impact of Directors' and Officers' Liability Suits on Firm Value*, 56 J. Risk & Insurance 128 (1989); Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 Cornell L.Rev. 261 (1986). The two shareholder-appellants in this case believe that the modest settlement, half of which will be paid to counsel, exemplifies this problem. Their failure to become parties prevents us from considering this contention, for the possibility that a district court's judgment is erroneous does not dispense with the need for an appeal by a party.

One court of appeals has held, despite *Marino*, that a shareholder need not become a party in order to appeal

from the final decision in derivative litigation. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307-10 (3d Cir.1993). The third circuit conceived of the question as whether the shareholder has standing, which is misleading. Standing means injury in fact, and a reduction in the market price of one's stock is injury. Parties are a subset of injured persons. Equating injury with party status is exactly the approach disapproved by *Marino*. The third circuit thought that shareholders in derivative actions should be treated like class members in class actions, and it permitted the shareholders to appeal because it permits class members to appeal. 2 F.3d at 1309-10; see also *Carlough v. Amchem Products, Inc.*, 5 F.3d 707, 714 (3d Cir. 1993). One does not follow from the other; for reasons we have discussed, shareholders have the weaker claim. But in this circuit, which requires class members to intervene if they want to appeal, similar treatment of shareholders is ordained. We overrule *Tryforos* to the extent it permits non-party shareholders to appeal in actions under Rule 23.1, and we disagree with the conclusion of *Bell Atlantic*.

Appellants tell us that they relied on *Asgrow Seed* and *Tryforos* when deciding not to intervene as parties and implicitly ask us to defer the effect of any decision to overrule their holdings. But "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981).

Notwithstanding *Firestone*, the ninth circuit recently refused, on equitable grounds, to apply to pending cases a decision overruling a jurisdictional precedent. *George v. Camacho*, 119 F.3d 1393 (9th Cir.1997) (en banc). *George* stated that despite the sweep of its language *Firestone* should be confined to situations in which the disappointed appellant has some later opportunity to present

the claims to the court of appeals. A panel of this court reached the same conclusion in *Snyder v. Smith*, 736 F.2d 409, 415 (7th Cir.1984): "In [*Firestone*], the court of appeals held that an order denying a motion to disqualify counsel was not appealable prior to final judgment but, because its holding was contrary to precedent, it determined the merits of the order. The Supreme Court held that when an appellate court finds an order interlocutory and nonappealable, the court must dismiss the appeal. The Court did not address the issue of whether an appellate court must dismiss the appeal where a party who relies on a jurisdictional ruling is, under a subsequent decision, foreclosed from ever raising his issues in the appellate court. Thus, *Firestone* does not require this court to dismiss the appeal." When deciding whether to dismiss an appeal in light of new precedent, we concluded in *Snyder*, a court of appeals should look not to *Firestone* but to *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), which gives a dominant role to equitable interests such as reliance on precedent.

Cases decided by the Supreme Court since *Snyder* require us to proceed differently. *Chevron* has been overruled. Harper v. Virginia Department of Taxation, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). The second court no longer considers whether application of the new rule would be inequitable or undermine reliance interests. Instead, when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper*, 509 U.S. at 97, 113 S.Ct. at 2517. This language holds out the option of announcing a rule with wholly prospective force, inapplicable to the parties in the case that announces the rule. But a second line of cases, including *Firestone*, withholds

the option of complete prospectivity when the rule concerns jurisdiction. Seven years after *Firestone* (and four years after *Snyder*) a litigant asked the Supreme Court to make a ruling prospective in order to prevent a "significant change in the law" from knocking out appellate jurisdiction. The Court declined. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203, 108 S.Ct. 1717, 1722, 100 L.Ed.2d 178 (1988) (citing and quoting from *Firestone*). *Budinich*, like *Snyder*, *George*, and the case now at hand, involved an appeal from a final judgment; the holding in *Budinich* meant that the losing party could never appeal, a conclusion that washes away the distinction we drew in *Snyder*. Later the same Term, the Court reiterated the point in language equally pertinent today:

> Our agreement with the [court of appeals'] conclusion that it lacked jurisdiction, compels us to disapprove of its decision to reach the merits anyway "in the interest of justice." 822 F.2d at 1559. "Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850). See also *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-380, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981). . . . The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction. . . . Such situations inhere in the very nature of jurisdictional lines, for as our cases aptly illustrate, few jurisdictional lines can be so finely drawn as to leave no room for disagreement on close cases. See, *e.g.*, *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 108 S.Ct. 950, 99 L.Ed.2d 151 (1988); *United States v. Hohri*, 482 U.S. 64, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987).

Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 818, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988). The proposition that "a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists" requires us to overrule *Snyder* and disagree with *George*. Jurisdiction means adjudicatory power. Equitable considerations are altogether irrelevant when a court lacks adjudicatory power. Cf. *Landgraf v. USI Film Products*, 511 U.S. 244, 274, 114 S.Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994) (pointing out that statutes repealing grants of jurisdiction apply to pending cases, notwithstanding reliance interests); *Yang v. INS*, 109 F.3d 1185 (7th Cir.1997). If the shareholders had appealed to the House of Lords, that tribunal would have dismissed the appeal out of hand. An appeal by nonparties is no different in effect.

Because this opinion overrules some of our decisions and creates a conflict among the circuits, it was circulated before release to all judges in active service. See Circuit Rule 40(e). No judge favored hearing the case en banc.

The appeal is dismissed for want of jurisdiction.

APPENDIX B

[Filed July 7, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 95-2279

PAUL FELZEN, TRUSTEE OF LOUISE LASKIN TRUST—1991 AND SANDRA ESNER,

Plaintiff,

vs.

DWAYNE O. ANDREAS, RALPH BRUCE, JOHN H. DANIELS, HOWARD G. BUFFETT, LOWELL W. ANDREAS, JAMES R. RANDALL, MICHAEL D. ANDREAS, H.D. HALE, O. GLENN WEBB, MARTIN ANDREAS, MARGARETTA ROCKEFELLER, F. ROSS JOHNSON, RAY A. GOLDBERG, JOHN K. VANIER, SHREVE M. ARCHER, JR., M. BRIAN MULRONEY, AND ROBERT S. STRAUSS,

Defendant.

and

ARCHER DANIELS MIDLAND COMPANY,
a Delaware corporation,

Nominal Defendant.

FINAL JUDGMENT AND ORDER OF DISMISSAL

This matter having come before the court for hearing, pursuant to the order of this court, dated May 30, 1997, on the application of the parties for approval of the settlement set forth in the stipulation of settlement, dated as of May 29, 1997 (the "stipulation") and due and adequate notice having been given to the shareholders of Archer

Daniels Midland Company, and the court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This court has jurisdiction over the subject matter of this action and over all parties to this action.

2. The definitions of terms in the stipulation are incorporated herein as though fully set forth in this judgment.

3. The notice given to the shareholders of Archer Daniels Midland Company, including the individual notice to current shareholders who could be identified through reasonable effort, of the settlement and other matters set forth in the stipulation was the best notice practicable under the circumstances. The notice provided due and adequate notice of the proceedings and of the matters set forth therein, including the proposed settlement, to all persons entitled to notice, and the notice fully satisfied the requirements of Rule 23.1 of the Federal Rules of Civil Procedure and the requirements of due process.

4. Pursuant to Rule 23.1 of the Federal Rules of Civil Procedure, this court hereby approves the settlement set forth in the stipulation and finds that the settlement is, in all respects, fair, reasonable and adequate to Archer Daniels Midland company ("ADM") and its shareholders.

5. The court hereby dismisses this action against the company (as defined in the stipulation) and the individual defendants (as defined in the stipulation) with prejudice and without costs (except as otherwise provided in the stipulation).

6. The court hereby dismisses without prejudice all claims in this action directed against Michael D. Andreas (as defined in the stipulation), which claims shall become the sole property of the company.

7. Upon the effective date, each and every settled claim is and shall be deemed to be conclusively released. "Settled claims" shall mean any and all causes of action, suits, demands, claims, matters and issues, whether known or unknown, which have been, could have been, or in the future might be asserted, advanced or alleged in this action or in the action pending in the Delaware Court of Chancery captioned *In re Archer Daniels Midland Company Derivative Litigation*, Consolidated No. 14403 (the Delaware Action) or in any court or arbitration proceeding (including, without limitation, any claims, actions or demands arising under any federal or state law relating to alleged fraud, breach of any duty, negligence, recklessness, violations of federal or state securities laws, violations of federal or state antitrust laws or otherwise) by or on behalf of the company (as defined in the stipulation), by any shareholder of said company derivatively on its behalf, or by any named plaintiff in this action or the Delaware Action (as defined in the stipulation) on their own behalf or on behalf of any record or beneficial holder of the stock of the company (as defined in the stipulation), whether individual, class, derivative, representative, legal, equitable, or any other type in any other capacity, which claims have arisen, could have arisen, arise now or hereafter arise out of, or relate in any manner to the allegations, transactions, matters or occurrences, representations, acts or omissions, or any series thereof, involved, set forth, referred to, or related to any of the pleadings in this action or the Delaware action (as defined in the stipulation) against the company (as defined in the stipulation) and/or any of the individual defendants (as defined in the stipulation), provided, however, that settled claims shall not include any claims which the company may have against Andreas (as defined in the stipulation) or Wilson (as defined in the stipulation), which claims shall be reserved to the company in the sole discretion of the company's board of directors.

8. Upon the effective date, the company (as defined in the stipulation) and each of the director defendants (as

defined in the stipulation) shall be deemed to have, and by operation of this judgment shall have, fully, finally, and forever released, relinquished and discharged the plaintiffs and counsel to the plaintiffs, each only in his or her capacity as such, from all claims arising out of, relating to, or in connection with the institution, prosecution, assertion or resolution of this action or the settled claims.

9. Upon the effective date, ADM shall be deemed to have, and by operation of this judgment shall have, fully, finally and forever discharged all settled claims. Any claims which ADM has against the excluded persons, or which ADM may have against Andreas or Wilson are expressly reserved to the company in the sole discretion of the company's board of directors.

10. Upon the effective date, ADM shall be deemed to have, and by operation of this judgment shall have, fully, finally, and forever discharged any claims which it may have against the individual defendants for reimbursement of any costs or fees advanced for them (or on their behalf) for defense of the settled claims.

11. Without affecting the finality of this judgment in any way, this court retains continuing jurisdiction over (a) implementation of this settlement; (b) the claims against the defendants in this action until the effective date (as defined in the stipulation) and until each and every act agreed to be performed by the parties to the stipulation shall have been performed pursuant to the stipulation; (c) all parties to this action for the purpose of enforcing and administering the stipulation and the releases contained therein; and (d) any other matter related or ancillary thereto.

12. In the event that the settlement does not become effective in accordance with the terms of the stipulation, then this judgment shall be rendered null and void and shall be vacated and, in such event, subject to Section F,

paragraph 2 of the stipulation, all orders entered and releases delivered in connection therewith shall be null and void.

ENTER this 7th day of July, 1997.

/s/ Harold A. Baker
HAROLD A. BAKER
United States District Judge

APPENDIX C

[Filed July 7, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 95-2279

PAUL FELZEN, TRUSTEE OF
LOUIS LASKIN TRUST 1991, *et al.*,
Plaintiff,

vs.

DWAYNE O. ANDREAS, *et al.*,
Defendants.

ORDER AWARDING ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

This matter coming to be heard before the United States District Court for the Central District of Illinois (the "district court"), on the 7th day of July, 1997, and the court having considered all papers filed herein and the proceedings conducted herein, having found the settlement of the present litigation to be fair, reasonable and adequate, and otherwise being fully informed in the premises hereof, it is hereby ordered, adjudged and decreed as follows:

1. The court finds that it has jurisdiction over the subject matter hereof, all parties hereto, and all matters relating to the present litigation.

2. All of the capitalized terms used herein shall have the same meaning as set forth in the stipulation of settlement dated May 29, 1997, (the "stipulation"), which was

filed herein on May 30, 1997, as part of an agreed motion for preliminary approval of the settlement (Dkt. #60).

3. The fees, expenses, and interest thereon, as awarded herein, shall be paid as directed herein from the settlement proceeds, and subject to the terms, conditions, and obligations of the stipulation, and in particular paragraph V.C. of said stipulation.

4. Considering: the results accomplished; the contribution of the various plaintiff attorneys; the complexity of the actions; the fee arrangements in similar litigation; a lodestar analysis; and the cap on fees and expenses negotiated between the parties plaintiff and defendant; the court hereby awards gross fees and expenses to the plaintiffs' attorneys in the amount of 49 percent of the settlement proceeds ($3,920,000.00).[1] These fees and expenses shall be divided 60 percent to the federal action or $2,352,000, and 40 percent or $1,568,000 to the Delaware actions. These awards shall include pro-rata interest earned thereon, which interest shall continue to accrue until said award from the Settlement Proceeds is paid to the attorneys representing the various plaintiffs in the federal and Delaware actions.

ENTER this 7th day of July, 1997.

/s/ Harold A. Baker
HAROLD A. BAKER
United States District Judge

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[1] *Cf. Florin v. Nationsbank of Georgia*, 34 F.3d 560, *passim* (7th Cir. 1994); *In Re Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, *passim* (7th Cir. 1992). (setting fees from a common fund).

APPENDIX D

Federal Rule of Civil Procedure 23.1. **Derivative Actions by Shareholders**

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

APPENDIX E

Federal Rule of Appellate Procedure 3. **Appeal as of Right—How Taken**

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal.—A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on

behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

(d) Serving the Notice of Appeal.—The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record (apart from the appellant's), or, if a party is not represented by counsel, to the party's last known address. The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. The clerk's failure to serve notice does not affect the validity of the appeal. Service is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

(e) Payment of Fees.—Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

APPENDIX F

28 U.S.C. § 1291. **Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.